83-1152

No.

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SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES X. BELL . . . . . Petitioner

versus

CITY OF LOUISVILLE . . . . Respondent

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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Counsel for Petitioner Bell

January ____, 1984

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Did the Kentucky Court of Appeals deprive petitioner, CHARLES BELL, of his constitutional right to due process of law by affirming the Louisville Civil Service Board's Decision to Dismiss him from employment with the Louisville-Jefferson County Board of Health?

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SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

CHARLES BELL - - - - - *Petitioner*

v.

CITY OF LOUISVILLE - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

The petitioner, CHARLES BELL, respectfully urges that a Writ of Certiorari be granted to review the decision of the KENTUCKY COURT OF APPEALS entered October 14, 1983, affirming the decision of the LOUISVILLE CIVIL SERVICE BOARD to dismiss him from employment with the Louisville-Jefferson County Board of Health.

The list of proper parties to this action is: CITY OF LOUISVILLE, KENTUCKY AND JEFFERSON COUNTY BOARD OF HEALTH, a joint city-county agency.

OPINION BELOW

The unreported decision of the Kentucky Court of Appeals was entered on October 14, 1983. The unreported Order of the Jefferson Circuit Court was entered May 12, 1982.

JURISDICTION

The Court's jurisdiction is authorized by 28 U.S.C. §2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14, Section 1, of the Constitution of the United States, reads as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall aridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In March 1981, petitioner CHARLES BELL, was dismissed from his job as a painter with the City of Louisville and Jefferson County Board of Health. Bell appealed his dismissal to the Louisville Civil Service Board whereupon hearing was held and, unknown to Bell or his counsel, pre-hearing ex-parte communication between the chairman of the hearing panel and a secretary and employee of the City of Louisville resulted in the said chairman requesting two armed policemen to sit in the hearing room throughout the hearing.

Petitioner Bell contends that the presence of armed policemen at the hearing and the ex-parte pre-hearing communication grievously tainted the hearing and deprived him of due process, a fair hearing, property, and liberty, set forth by this Honorable Court in *Board of Regents* v. *Roth*, 408 U. S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), and in *Arnett* v. *Kennedy*, 416 U. S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974).

The foregoing denial of due process contention was first raised by counsel for Bell on appeal to the Jefferson Circuit Court where the ex-parte communication was discovered upon examination of the chairman of the hearing panel. The said contention was also raised on appeal to the Kentucky Court of Appeals by Bell's present counsel.

The Kentucky Court of Appeals disposed of Bell's denial of due process contentions by stating in its decision (pages 3 and 4) that:

1. Evidence was adduced by the trial court that it was common practice for police officers to be present during board hearings.
2. The chairman of the hearing panel testified in the Circuit Court that none of the other board members knew that he had requested the presence of two police officers.

Bell had no further right to appeal under Kentucky law. He did have an option to move for discretionary review of the Kentucky Court of Appeals' decision by the Kentucky Supreme Court. Under these circumstances petitioner verily believes that he is in compli-

ance with the Doctrine of Finality. *Thompson* v. *City of Louisville*, 362 U. S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960).

REASON FOR GRANTING THE WRIT

The chairman of the hearing board deprived Bell of his property interests, right to a fair hearing, and liberty to retain employment when he engaged in ex-parte communication without testing the truthfulness or accuracy of the allegations made by the secretary that Bell had threatened one of his former supervisors. *Jarett* v. *United States*, 375 F. 2d 777 (1967). It is stated in *Camero* v. *United States*, 375 F. 2d 777 (1967):

> "One of the fundamental premises inherent in the concept of an adversary hearing, particularly if it is of the evidentiary type, is that neither adversary be permitted to engage in an ex-parte communication concerning the merits of the case with those responsible for the decision."

The presence of two armed policemen in uniform at the hearing cast an onus upon Bell and created an atmosphere in which a fair hearing could not be held. Further, the ex-parte communication that Bell had threatened someone, and the hearing chairman's reaction to it, constituted an additional charge against Bell to which he had no opportunity to defend.

Bell vigorously stated at the Jefferson Circuit Court hearing on his appeal that no police officers are ever present except at police Civil Service hearings. It

would be utterly ridiculous for one to contend, as the hearing board chairman did, that the other members of the panel were not affected by the presence of uniformed, armed policemen.

Bell contends that the ex-parte communication between the hearing board's chairman and the City of Louisville secretary was within the hearing and knowledge of the remaining four board members and so tainted and prejudiced the adversary trial type hearing that he was deprived of property and liberty without due process of law.

CONCLUSION

For the reasons hereinabove stated, the Court is urged to issue the Writ of Certiorari to the Kentucky Court of Appeals.

Respectfully submitted,

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Counsel for Bell

APPENDIX

APPENDIX A

OPINION RENDERED: OCTOBER 14, 1983; 2:00 P.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 82-CA-1794-MR

CHARLES X. BELL - - - - - - - *Appellant*

v.

CITY OF LOUISVILLE - - - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Henry D. Hopson, Judge
Case No. 81-CI-08452

AFFIRMING

BEFORE: LESTER, WILHOIT and DUNN, Judges.

DUNN, JUDGE. Bell appeals from the Jefferson Circuit Court judgment affirming the Louisville Civil Service Board's decision to dismiss him from his employment with the City of Louisville.

Bell was hired by the City of Louisville in 1978 as a "Crew Leader." His job consisted of performing various paint scraping and painting duties under the Louisville Department of Health's Lead Program. In August 1980, he was reclassified to "painter"; the reclassification required a 6-month probationary period. In February 1981, his probationary period was extended 30 days to clarify some of the incidents which ultimately caused his dismissal in March 1981.

After Bell was dismissed, he requested a hearing with the Louisville Civil Service Board. A hearing was held on

July 21, 1981, and the Board voted 4 to 1 to sustain the dismissal. Bell then appealed to the Jefferson Circuit Court, which affirmed the Board. It is from that Judgment that Bell appeals. We affirm.

The record reveals that there were 5 incidents from July, 1979 to March, 1981, which eventually led to Bell's dismissal. Two of these incidents involved his allegedly being away from his work site without permission and without advising his supervisor, two incidents involving his being verbally abusive to two secretaries who were employed by the City, and one incident involved insubordination with his supervisor. In his testimony he attempted to explain these incidents. His main excuse was that other staff members were out to get him. He also produced copies of his "Performance Appraisals" which indicated that he was consistently given satisfactory ratings and that there were no complaints about his actual work. Bell's basis for appeal is that the decision of the civil service board was not supported by substantial evidence and he was denied a fair and impartial hearing.

Addressing Bell's first basis of appeal, we recognize that an action taken by an administrative agency is arbitrary unless it is supported by substantial evidence. *American Beauty Homes Corporation* v. *Louisville and Jefferson County Planning and Zoning Commission*, Ky., 379 S. W. 2d 450 (1964). The transcript of the hearing held by the Louisville Civil Service Board on behalf of Bell contains testimony of several of Bell's co-workers and supervisors. The program co-ordinator testified as to an incident involving Bell verbally abusing a secretary; the witness was present during this incident and she also testified as to knowledge she had of another incident of abuse Bell had with a different secretary. There was also testimony from his direct supervisor that Bell had behaved in an insubordinate manner

with him and that he knew of several times when Bell was either attending to personal business during working hours or was not where he was supposed to be. In short, there is more than sufficient evidence in the record that the appellant's conduct was unsatisfactory.

Bell also contends that he was denied a fair and impartial hearing. According to the appellant's interpretation of the circumstances of the hearing, the chairman of the civil service board evidenced prejudice towards Bell because the chairman asked two police officers to be present during the hearing. The trial court held a hearing on this matter and evidence was adduced that two police officers were present but that it was common practice for police officers to be present during board hearings. The chairman of the board also testified that none of the other board members knew that he had asked for the police officers or why he had asked for them. Although the chairman voted in this matter, his vote was not determinative of Bell's dismissal; even if the chairman didn't vote, the votes of the other board members were sufficient for dismissal.

Administrative officers must execute the law committed to them fairly and honestly; equal treatment for everyone according to the standards and rules of action prescribed is required. *Commonwealth* v. *Frost*, Ky., 172 S. W. 2d 905 (1943). The evidence showed that the chairman requested the presence of the officers because of the threat or threats Bell allegedly made against one of his supervisors. The chairman testified that he judged Bell only on the evidence and that his vote did not effect the ultimate outcome. There is nothing in the record to indicate that either the chairman or the board treated appellant any differently than anyone else. No evidence was adduced that the presence of the officers affected the votes of the Board members or that the members would have voted differently without the presence of the officers.

We need not address the issues raised in appellee's motion to dismiss this appeal, since they have been rendered moot by virtue of the holding in this opinion.

The judgment of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

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APPENDIX B

JEFFERSON CIRCUIT COURT

EIGHTH DIVISION

No. 81 CI 08452

CHARLES X. BELL - - - - - - - *Appellant*

v.

CITY OF LOUISVILLE - - - - - - - *Appellee*

ORDER

This cause coming on to be heard by the Court without a jury and the Court having heard the evidence and considered the briefs and memoranda filed by the counsel, it is hereby ordered that the decision of the Civil Service Board is affirmed.

Henry D. Hopson, Judge

APPENDIX C

FINDING AND ORDER

A hearing was held on behalf of Charles X. Bell, dismissed Painter, to appeal his dismissal from the Louisville and Jefferson County Department of Public Health, by the Director of Health, the appointing authority. The appeal was heard by a quorum of the Board, consisting of George Kinkead, Vice-Chairman; Mrs. Anne DeLozier, Member; Mr. James Powers, Member; Mr. James Carr, Member; and Mr. William Meyers, Member. Mr. Mark Dobbins, was also present as Legal Counsel for the Board. This hearing was held July 21, 1981.

Both the appellant and the appointing authority were represented by counsel, these being Mr. Jonathan Goldberg, representing the Health Department, and Mr. Elgin Crull, representing Mr. Bell.

Evidence was introduced and witnesses testified, and the Board made the following finding and order:

1. Mr. Bell was employed as a Crew Leader by the Health Department January 3, 1978, and certified as a regular employee on July 2, 1978. Mr. Bell was subsequently given a qualifying exam and appointed to the position of Painter on August 11, 1980, thus beginning a 6 month probationary promotional period, which was extended by the Civil Service Board for 30 days at the request of the Health Department, to expire March 9, 1981;
2. Mr. Bell was dismissed on the last day of this extension for Unsatisfactory Completion of Probationary Period;
3. Testimony indicated that Mr. Bell has a history of unexcused absences from the assigned work areas;

inability to deal courteously with co-workers; and displaying aggressive and intimidating behavior;

4. No specific faults were found with Mr. Bell's actual work, however, his absence from assignments were found to be for use of the Health Department vehicle for personal errands, which is specifically prohibited;
5. Mr. Bell failed to notify his immediate supervisor, or anyone at the Health Department when he would not be reporting for work, however, he did indicate on his weekly report that he was working at 1241 S. Clay, on March 2nd, and March 5th, 1981.
6. Two employees of the Public Health Department testified that Mr. Bell was not at 1241 S. Clay on March 2nd, but did work at that address on March 5th. A check with the resident indicated a Painter had been at that address one day, but definitely not two days, as indicated by Mr. Bell, which constituted falsification of records.

Wherefore, it was the decision of the Civil Service Board that the action of the appointing authority in dismissing Charles X. Bell be sustained, by a vote of four in favor, one against.

For The Civil Service Board